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**From:** Allison - CDPHE, William [william.allison@state.co.us]  
**Sent:** 8/15/2016 8:37:29 PM  
**To:** Morales, Monica [Morales.Monica@epa.gov]  
**Subject:** Re: FW: NRDC v EPA case  
**Attachments:** WGA EPA OMB Background Ozone FINAL.pdf

Thanks for sending, Monica. Also, fyi, we had a call earlier today with OMB re: the proposed revisions to the EE rule. Scott Jackson and Richard Peyton were also on the call. WGA also sent a letter on the issue last week, which I've attached. See you tomorrow. Will

William C. Allison V  
Director



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On Thu, Aug 11, 2016 at 3:56 PM, Morales, Monica <[Morales.Monica@epa.gov](mailto:Morales.Monica@epa.gov)> wrote:

Monica S. Morales  
Acting Director, Air Program (8P-AR)  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202-1129  
Phone: [\(303\) 312-6936](tel:(303)312-6936)  
[morales.monica@epa.gov](mailto:morales.monica@epa.gov)

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**From:** Denawa, Mai

**Sent:** Thursday, August 11, 2016 3:40 PM

**To:** Robyn Wille <[Robyn.Wille@coag.gov](mailto:Robyn.Wille@coag.gov)>; [chris.colclasure@state.co.us](mailto:chris.colclasure@state.co.us); [dena.wojtach@state.co.us](mailto:dena.wojtach@state.co.us)

**Cc:** Fulton, Abby <[Fulton.Abbey@epa.gov](mailto:Fulton.Abbey@epa.gov)>; Morales, Monica <[Morales.Monica@epa.gov](mailto:Morales.Monica@epa.gov)>; Boydston, Michael <[Boydston.Michael@epa.gov](mailto:Boydston.Michael@epa.gov)>

**Subject:** RE: NRDC v EPA case

All:

Please find attached an updated analysis of the NRDC v EPA case. While it is largely similar to the previously sent email below, it provides some further detail from the preamble implementing the 1990 CAAA that may provide some further background that we hope is helpful.

Thank you,

Mai

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**From:** Robyn Wille [<mailto:Robyn.Wille@coag.gov>]

**Sent:** Friday, August 05, 2016 12:39 PM

**To:** Denawa, Mai <[Denawa.Mai@epa.gov](mailto:Denawa.Mai@epa.gov)>; [chris.colclasure@state.co.us](mailto:chris.colclasure@state.co.us); [dena.wojtach@state.co.us](mailto:dena.wojtach@state.co.us)

**Cc:** Fulton, Abby <[Fulton.Abbey@epa.gov](mailto:Fulton.Abbey@epa.gov)>

**Subject:** RE: NRDC v EPA case

Thank you Mai.

We will consider your response, and get back to you as soon as we can.

Thanks again,

Robyn

Robyn Wille

Assistant Attorney General

Air Quality Unit

Direct #: 720-508-6261

Please note that as of December 14, 2015 my email address has changed -- it is now [robyn.wille@coag.gov](mailto:robyn.wille@coag.gov). Please update your records

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**From:** Denawa, Mai [<mailto:Denawa.Mai@epa.gov>]

**Sent:** Friday, August 05, 2016 12:07 PM

**To:** Robyn Wille; [chris.colclasure@state.co.us](mailto:chris.colclasure@state.co.us); [dena.wojtach@state.co.us](mailto:dena.wojtach@state.co.us)

**Cc:** Fulton, Abby

**Subject:** NRDC v EPA case

Thank you for your patience on your question regarding the relevance of NRDC v. EPA, 571 F.3d 1245, 1252 (D.C. Cir. 2009) to RACT. EPA concludes, after consultation with headquarters, that the holding from NRDC v. EPA is not applicable to the RACT requirement under section 182(b); the NRDC holding was limited to the reasonableness of EPA's interpretation of section 172(c)(1). Therefore, a section 182 requirement cannot be met by a showing that an area is attaining as expeditiously as practicable, as it otherwise would be permitted for areas subject only to RACT under section 172(c)(1).

Under the Phase 2 Implementation Rule, EPA determined that states with areas classified under subpart 1 of part D of title I of the Act could satisfy the requirement in section 172(c)(1) to implement "reasonably available control measures as expeditiously as practicable (including ... reasonably available control technology)" by submitting "an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable." 40 CFR 51.912(c)(1). The D.C. Circuit in NRDC v. EPA held that EPA had discretion to conclude that control measures were not "reasonably available" if they would not expedite attainment. NRDC v. EPA, 571 F.3d at 1252.

For areas classified under subpart 2, the Phase 2 Rule provided that a State was required to meet the VOC and NOx RACT requirements in sections 182(b)(2) and 182(f). 40 CFR 51.912(a). The RACT requirements in section 182 are more prescriptive than those in section 172(c)(1). EPA's interpretation of the RACT requirement in section 172(c)(1) does not apply to the more prescriptive mandates in section 182(b)(2).

As a result, EPA recommends that the state omit references in its SIP to the 2009 DC Circuit's NRDC v EPA case when discussing RACT because Colorado is required to demonstrate RACT under section 182(b)(2). For example, p.6-11 of the Proposed Moderate Ozone SIP currently states:

In *NRDC v EPA*, the DC Circuit held that it is reasonable to conclude that no control technologies are reasonably available where imposition of additional control technologies would not hasten achievement of the NAAQS. Where additional control technologies cannot be implemented by January 1, 2017, Colorado's achievement of the NAAQS is not hastened and the additional control technologies are not RACT.

Additionally, EPA recommends that the underlined portions above be struck because it is not relevant to a section 182(b)(2) RACT analysis.

Please let me know should you have any questions or concerns, or if you'd like to schedule a follow-up phone call to discuss further.

Thank you and have a great weekend,

Mai

**Mai Denawa**

*Honors Attorney Fellow*

Office of Regional Counsel

EPA Region 8

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